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4 **IN THE UNITED STATES DISTRICT COURT**
5 **FOR THE DISTRICT OF OREGON**
6 **PORTLAND DIVISION**

7 EDWARD DUFF, PAMELA DUFF,)
8 JACK DUFF, JUDY DUFF, MICHAEL)
9 McSORLEY and KATHLEEN McSORLEY,) No. 03:11-cv-00314-HU
10)

11 Plaintiffs,)

12 vs.)

13 U.S. GOLD & SILVER INVESTMENTS,)
14 INC., an Oregon corporation; and)
15 LAWRENCE H. HEIM;)

16 Defendants.)

17 **FINDINGS AND RECOMMENDATION**
18 **ON MOTION FOR DEFAULT JUDGMENT**

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28 HUBEL, United States Magistrate Judge:

On April 12, 2011, I granted the plaintiffs' motion, Dkt. #5, for entry of default against the defendants in this case for their failure to answer or otherwise respond to the plaintiffs' Complaint. Dkt. #7; see Dkt. #3 & #4, evidencing service of Summons and Complaint on both defendants on March 16, 2011. The matter now is before the court on the plaintiffs' motion for default judgment. Dkt. #8. The motion is supported by the

1 Declaration of Jonathan J. Locke, Dkt. #9, and a brief, Dkt. #10.
2 I submit the following Findings and Recommendation for disposition
3 of the motion pursuant to 28 U.S.C. § 636(b)(1)(B).

4 The plaintiffs brought this action to recover sums they paid
5 to the defendants for the purchase of gold and silver coins.
6 Between March and May 2007, the plaintiffs Michael and Kathleen
7 McSorley engaged in five transactions with the defendants for the
8 purchase of a total of nine bags of "face-value pre-1965 U.S.
9 silver coins," for a total price of \$84,950.00. Dkt. #10, pp. 2-3;
10 Dkt. #1, ¶ 8. At the time of each purchase, the defendants repre-
11 sented to the McSorleys that they could either have the coins
12 shipped to them, or the coins could be held on account by the
13 defendants, to be delivered to the McSorleys upon demand. The
14 McSorleys elected to have the silver coins held on account. They
15 paid for all of the coins in full, and received invoices from U.S.
16 Gold showing the silver coins were "SOLD TO" the McSorleys. *Id.*
17 On February 27, 2011, the McSorleys made demand on U.S. Gold for
18 the delivery of \$9,000 of "face-value pre-1965 U.S. silver coins."
19 Dkt. #10, p. 3; Dkt. #1, ¶ 15. The defendants have never delivered
20 the coins as requested.

21 The plaintiffs Jack and Judy Duff paid the defendants \$252,000
22 on or about October 14, 2010, for the purchase of 180 one-ounce
23 American Eagle gold coins. Edward and Pamela Duff paid the
24 defendants \$137,500 on or about October 21, 2010, for the purchase
25 of 100 one-ounce American Eagle gold coins. The defendants
26 represented to Jack and Edward Duff that delivery of the gold coins
27 could take up to three months. The sales invoices for the Duffs'
28 purchase of the gold coins contained the notation, "Customer

1 accepts as much as 3 months delay before delivery." Dkt. #10, p.
2 4; Dkt. #1, ¶ 14. Edward Duff made demand on February 27, 2011,
3 for delivery of the gold coins he and Pamela Duff had purchased.
4 Jack Duff made demand on March 2, 2011, for delivery of the gold
5 coins he and Judy Duff had purchased. The defendants have never
6 delivered the coins as requested. Dkt. #10, p. 4; Dkt. #1, ¶¶ 18
7 & 19.

8 The court takes as true the plaintiffs' "well-pleaded allega-
9 tions of fact relating to liability" upon entry of default against
10 the defendants. *Gen. Produce Co. v. Phoenix Farmers Market, LLC*,
11 slip op., 2011 WL 1079939, at *1 (D. Or. Jan. 13, 2011) (Clarke,
12 J.) (citing *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917
13 (9th Cir. 1987) (other citations omitted). The facts, once
14 established, are deemed "conclusive upon entry of judgment." *Id.*
15 (citing *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d
16 1200, 1206 (5th Cir. 1975)). The plaintiffs must establish their
17 damages "by proof, unless the amount is liquidated or otherwise
18 susceptible of computation." *Id.* (citing *Flaks v. Koegel*, 504 F.2d
19 702, 707 (2d Cir. 1974)); see *Davis v. Fendler*, 650 F.2d 1154, 1161
20 (9th Cir. 1981) ("It is well settled that a default judgment for
21 money may not be entered without a hearing unless the amount
22 claimed is a liquidated sum or capable of mathematical
23 calculation.") (citing *United Artists Corp. v. Freeman*, 605 F.2d
24 854, 857 (5th Cir. 1979)).

25 Here, the plaintiffs seek damages for the defendants' failure
26 to deliver the coins upon demand. The plaintiffs claim they are
27 entitled to the market value of the coins the defendants failed to
28 deliver, rather than simply the price paid for the coins. They

1 assert their damages are governed by the Uniform Commercial Code
2 ("UCC"), which governs "transactions in goods." UCC § 2-102, ORS
3 § 72.1020. The UCC defines "goods" to exclude "money in which the
4 price is to be paid." UCC § 2-105, ORS 72.1050(1). However, the
5 official comment to the section states the definition of "goods" is
6 "intended to cover the sale of money when money is being treated as
7 a commodity," rather than simply as the medium of payment. *Id.*,
8 comment 1. The court agrees the transactions between the
9 plaintiffs and the defendants are governed by the UCC. The court
10 also agrees with the plaintiffs' assertion that no evidentiary
11 hearing is required in this case because, as discussed below, the
12 plaintiffs' damages are "capable of mathematical calculation."

13 The UCC provides that when a seller fails to make delivery,
14 the measure of damages "is the difference between the market price
15 at the time when the buyer learned of the breach and the contract
16 price together with any incidental and consequential damages
17 provided in ORS 72.7150, but less expenses saved in consequence of
18 the seller's breach." UCC § 2-713(1), ORS 72.7130(1).^{*} The
19 "crucial time" for determining the buyer's damages "is the time at
20 which the buyer learns of the breach." *Id.*, comment 1. As to what
21

22 ^{*}The court notes the plaintiffs have quoted from section 2-713
23 of the amended version of UCC § 2-713, adopted by the National
24 Conference of Commissioners on Uniform State Laws in 2003. See
25 Dkt. #10, p. 5. Oregon has not adopted revisions to ORS § 72.7130
26 since its original enactment in 1961. Subsection (a) quoted by the
27 plaintiffs is virtually identical to ORS § 72.7130(1). However,
28 subsection (b) quoted by the plaintiffs, specifying the measure of
damages for repudiation by the seller, is not included in the
Oregon statute. The error is harmless, however, because the
plaintiffs' remedy and available damages would be the same whether
the court views the defendants' breach as a failure to deliver or
a repudiation.

1 constitutes the "market price," the official comments explain the
2 price used "under this section is the price for goods of the same
3 kind and in the same branch of trade." *Id.*, comment 2.

4 To establish the market value of the coins in this case, the
5 plaintiffs offer Declarations of Jonathan J. Locke. Dkt. ##9 & 13.
6 Locke is the president of Columbia Coin Co., Inc., a family-owned
7 and operated retail coin company based in Portland Oregon,
8 specializing in United States coins. According to Locke, Columbia
9 Coin is "one of the largest retail coin stores in North America."

10 Dkt. #9, ¶ 2. As part of Locke's business, he has performed over
11 5,000 appraisals to determine the cash value of U.S. gold and
12 silver coins. He states his appraisals "have been used in many
13 court cases and by numerous federal, state and local law enforce-
14 ment agencies, including the Drug Enforcement Administration and
15 the Federal Bureau of Investigation[]." *Id.*, ¶ 4. Locke's
16 appraisals also have been "used in hundreds of estates." *Id.* The
17 court finds that Locke's knowledge, skill, and experience render
18 him qualified as an expert to provide opinion evidence on the issue
19 of the market value of the coins purchased by the plaintiffs. See
20 Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,
21 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its
22 progeny.

23 Locke conducted appraisals to determine the market value of
24 the types of coins purchased by the plaintiffs from the defendants,
25 including (1) nine \$1,000 face-value bags of silver coins, as
26 purchased by the McSorleys; 180 one-ounce American Eagle gold
27 coins, as purchased by Jack and Judy Duff; and 100 one-ounce
28 American Eagle gold coins, as purchased by Edward and Pamela Duff.

1 Locke based the appraisals on the spot price of the coins as of the
 2 date the plaintiffs made demand on the defendants for delivery.
 3 However, because February 27, 2010, was a Sunday and the domestic
 4 precious metals markets were closed, Locke's valuations of the
 5 McSorley coins and Jack and Judy Duff coins were based on the new
 6 York spot price as of Monday, February 28, 2010. *Id.*, ¶ 7.

7 Locke appraised the market values of the coins purchased by
 8 the plaintiffs as follows:

9 McSorley coins

10 9 x \$1,000 Face Value bags US 90% silver coins
 at \$22,700 each as of February 28, 2010 \$204,300

11 Jack and Judy Duff coins

12 180 1-oz American Eagle gold coins at \$1,437.20
 each as of March 2, 2011 \$258,696

13 Edward and Pamela Duff coins

14 100 1-oz American Eagle gold coins at \$1,409.30
 each as of February 28, 2010 \$140,930

15 *Id.*, attachments to Locke Declaration. Locke noted on each
 16 appraisal that he had not actually seen the coins in question, but
 17 was assuming, for purposes of the appraisals, that the coins were
 18 "in Industry Standard 'good delivery' or Uncirculated condition."
 19 *Id.* Locke states that in his experience, "when coins are provided
 20 by a dealer in bulk, as was to be the case here, they are virtually
 21 always in 'Industry Standard "good delivery" condition.'" Dkt.
 22 #13, ¶ 2. He indicates this is "standard practice for all coin
 23 dealers," and it would be both improper and "extremely unusual for
 24 a coin dealer to sell these types of coins in any condition other
 25 than Industry Standard 'good delivery' condition." *Id.*

26 The court finds the market values of the coins purchased by
 27 the plaintiffs from the defendants to be the values shown in
 28 Locke's appraisals. The plaintiffs have not claimed any

1 "incidental and consequential damages as provided in ORS 72.7150,"
2 nor have they set forth any "expenses saved in consequence of the
3 seller's breach," as provided in ORS § 72.7130(1). Thus, the
4 plaintiff's damages are equal to the market values of the coins as
5 found by Locke in his appraisals.

6 The plaintiffs have shown they are entitled to judgment as
7 requested, and I therefore recommend that their motion for default
8 judgment be granted, with judgment entered against the defendants
9 and in favor of Michael and Kathleen McSorley in the amount of
10 \$204,300; in favor of Jack and Judy Duff in the amount of \$258,696;
11 and in favor of Edward and Pamela Duff in the amount of \$140,930.

12
13 ***SCHEDULING ORDER***

14 These Findings and Recommendations will be referred to a
15 district judge. Objections, if any, are due by **September 26, 2011**.
16 If no objections are filed, then the Findings and Recommendations
17 will go under advisement on that date. If objections are filed,
18 then any response is due by **October 14, 2011**. By the earlier of
19 the response due date or the date a response is filed, the Findings
20 and Recommendations will go under advisement.

21 IT IS SO ORDERED.

22 Dated this 6th day of September, 2011.

23
24 /s/ Dennis J. Hubel
25 Dennis James Hubel
26 Unites States Magistrate Judge
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